Supreme Court, U.S.
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No. 96-1985

In The Supreme Court Of The United States

OCTOBER TERM 1996

WILLIAM SNOW HUME,
Petitioner,

v.

W.J. WALLIS, MICHAEL C. MAYNARD, JAMES DON BANKHEAD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

RESPONDENT WILLIAM PETER GODFREY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, William Peter Godfrey, respectfully requests that this Court deny the Petition for Certiorari, which seeks review of the Ninth Circuit's decision upholding a stay by the district court under the *Colorado River* doctrine. The Ninth Circuit's decision is an unpublished memorandum opinion reprinted in the Petition for Certiorari at Appendix "F." The district court's ruling is reprinted in the Petition at Appendix "D."

STATEMENT OF THE CASE

Virtually all of the facts of this case are undisputed. The setting is the 1994 city council election in Fullerton, California. In the weeks prior to the election, hundreds of campaign signs of certain candidates began to disappear from both public and private property. Petitioner admitted to local police officers that he had removed many of the campaign signs, asserting he had the legal right to do so because they were posted illegally. Eventually, the district attorney filed a municipal court complaint against Petitioner for misdemeanor vandalism. California Penal Code § 594(b)(4). Approximately one year later, the district attorney requested a dismissal of the complaint, having concluded there was not a reasonable probability of proving the case beyond a reasonable doubt.

On November 2, 1995, Petitioner brought a state court action for malicious prosecution based upon his prosection for the sign removals. *Hume v. Flory, et al.*, Orange County Superior Court, Case No. 755114 (the "state action"). Petitioner initially named six defendants in the state action: Don Bankhead, an incumbent city council candidate whose signs had been removed; Jan Flory and William Peter

Godfrey, non-incumbent council candidates whose signs had been removed; Bill Flory, Jan's husband; Unocal Land and Development Company, from whose property some of the signs had been removed; and Dennis Chapman, a Unocal employee.

After demurrers to the state court complaint were sustained, Petitioner filed a first amended complaint on February 6, 1996, adding a claim for conspiracy and an additional defendant, Vincent Buck, a professor at California State University, Fullerton, who had witnessed Petitioner removing campaign signs from the Unocal property. Demurrers were again sustained, and Petitioner's appeal of the entry of judgment thereon is currently pending.

After the sustaining of the demurrers, Petitioner filed this federal action, again alleging malicious prosecution and conspiracy, this time based upon 42 U.S.C. § 1983, with pendent state claims for abuse of process. In addition to the original six defendants in the state court action, Petitioner added as defendants Unocal Corporation (the parent of Unocal Land and Development Company); Darryl Woods, a member of Unocal's legal department; and Michael Maynard and W.J. Wallis, Fullerton police officers.[1]

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[1] Michael Maynard was earlier named as a defendant in another federal action filed by Petitioner on October 4, 1995, arising out of the same facts, *Hume v. Maynard, et al.*, SACV 95-849 LHM. This action also named deputy district attorney Guy Ormes as a defendant, and was based upon 42 U.S.C. § 1983, for "unlawful threats" to arrest Petitioner if he continued to remove campaign signs.

The district court, noting certain problems in the complaint herein, issued an order to show cause as to why the complaint should not be dismissed for failure to state a claim. This OSC is attached hereto as Appendix "A." After learning from the parties' briefs that Petitioner's California state action was on appeal, the district court issued a second order to show cause, this time as to why this action should not be stayed "pending finality of the state action." The second OSC is attached hereto as Appendix "B." Thereafter, the district court conditionally stayed all proceedings pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Petition for Certiorari, Appendix "D." The Ninth Circuit upheld this action on appeal. Petition for Certiorari, Appendix "F."

In his Petition, Petitioner argues that the district court (1) failed to address the effect of federal issues in applying the *Colorado River* analysis; (2) did not resolve the issue of whether it had jurisdiction of the case before imposing the stay; (3) did not find that the state and federal actions were truly parallel before granting the stay; and (4) lacked authority to stay this case because Petitioner had reserved his federal claims in the state action under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). Petition, p. i.

REASONS FOR DENYING THE WRIT

I. The Lower Courts Did Not Ignore The Effect Of Federal Issues In Applying *Colorado River*.

Petitioner misstates the record in representing in his "first question presented" that in staying this action, the lower courts did not address one of the important factors of the *Colorado River* analysis, that is the presence of federal issues and claims. Petition for Certiorari, p. i. On the contrary, in upholding the district court's original order, the court of appeals specifically references the state versus federal law factor, which it identifies as the "third factor" in the *Colorado River* crucible. Petition for Certiorari, Appendix "F," p. 2. The court expressly states:

> Hume's state and federal actions are substantially similar because the record indicates that the federal litigation is a "spin-off" of Hume'[sic] state court action. . . . As stated above, ***resolution of both actions hinges upon the adjudication of Hume's state court conspiracy and malicious prosecution claims.*** . . . Accordingly, the ***third***, fourth, and fifth *Nakash* [*Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989)] factors also support the district court's decision to stay its proceedings.

Id., p. 4; emphasis added.

The district court was also well aware of the federal issue factor in originally staying the action. The district court notes in its ruling that the claims in both the state and federal actions allege malicious prosecution, and that affirmance of the state court's ruling will have collateral estoppel effect on the federal action. Id., Appendix "D," p. 3. Further, in its previous order to show cause re dismissal, the district court specifically states:

> (1) Malicious Prosecution. "***To state a claim for malicious prosecution under section 1983***, a plaintiff must demonstrate that: (1) ***he has satisfied the requirements of a state law cause of action for malicious prosecution***; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty." *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996).

Appendix "A" hereto, p. 1; emphasis added.

Thus, the lower courts were well aware of the federal issue factor of the *Colorado River* "exceptional circumstances" test, and dutifully weighed this factor in determining to stay this action.

II. The Jurisdiction Of The District Court Was Not Uncertain.

Petitioner also misstates the record in representing in his "second question presented" that the district court had found facts which deprived it of jurisdiction. Essentially, Petitioner argues that abstention in this case was premature because the district court never determined whether it had jurisdiction in the case. According to Petitioner, by issuing an OSC re dismissal, the district court expressed doubts about whether the federal complaint alleged a deprivation of a civil right. Since the district court then stayed the action prior to deciding the dismissal issue, the district court could not have properly believed it had subject matter jurisdiction over the case, and thus it was error to abstain.

This argument is not only frivolous, but places in doubt whether Petitioner brought this action for proper purposes. Petitioner filed this action under 42 U.S.C. § 1983, jurisdiction of which is granted district courts by 28 U.S.C. § 1343(3). Thus, jurisdiction was unquestionably conferred upon the district court unless the constitutional claim was "so attenuated and unsubstantial as to be absolutely devoid of merit," was "obviously frivolous," or was "no longer open to discussion." *Hagans v. Lavine*, 415 U.S. 528, 537, 94 S.Ct. 1372, 39 L.Ed.2d 577, 587 (1974). By advancing his argument that the district court may not have had jurisdiction, Petitioner perforce argues that his § 1983 claim was "obviously frivolous."[2]

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[2] Petitioner's admission also has serious adverse ramifications for him under Federal Rules of Civil Procedure, Rule 11, which provides for sanctions for presenting a complaint for any improper purpose.

Petitioner's argument misapprehends what occurred below. The district court never expressed doubt about its subject matter jurisdiction in its OSC re dismissal. Rather, the court merely stated that the Fourteenth Amendment right to substantive due process did not support a federal claim for malicious prosecution. Assuming, without deciding, that the First and Fourth Amendments may support a federal claim for malicious prosecution, the district court stated that it did not appear that Petitioner had stated facts sufficient to support either a First or Fourth Amendment claim. Appendix "A" hereto.

It is well settled that jurisdiction is ***not*** defeated by the possibility that the averments of a complaint might fail to state a cause of action on which a plaintiff could actually recover. Failure to state a proper cause of action calls for a judgment on the merits, not for a dismissal for want of jurisdiction. *Hagans v. Levine*, 415 U.S. at 542; *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Thus, because the district court's doubt was as to whether the complaint stated a cause of action, rather than as to whether the court had subject matter jurisdiction, Petitioner's argument regarding prematurity falls flat.

III. The State And Federal Court Actions Are "Parallel" Actions.

In his "third question presented," Petitioner erects a straw man argument, ascribing ambiguity where none exists. Essentially, Petitioner claims that "parallel" state and federal cases must exist before a *Colorado River* stay may be

imposed, and that the Ninth Circuit requires mere "similarity" in order to trigger *Colorado River*.

First, nothing in the decisions of this Court mandates that a district court make a formal threshold decision that cases are "parallel" before embarking on an analysis of whether a *Colorado River* stay is appropriate. Rather, in *Colorado River*, this Court "declined to prescribe a hard-and-fast rule for dismissals of this type, but instead described some of the factors relevant to the decision." *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 15, 103 S.Ct. 927, 74 L.Ed.2d 765, 779 (1983).

Nor do the decisions of this Court describe "parallel" actions as requiring *exact* parallelism between the federal and state actions. Rather, the degree of similarity or parallelism required between the actions is a sub-factor of those factors identified by the Court as appropriate for consideration. That is, weighing whether a stay will avoid piecemeal litigation, whether state or federal law controls, whether a litigant has been forum shopping, whether the state court proceedings are adequate to protect the litigants' rights, and whether the state court proceedings will have a *res judicata*/collateral estoppel effect, all inherently consider the parallelism of the state and federal actions. If the state action is not sufficiently parallel or similar to the federal action, the weight of these factors will compel a conclusion that jurisdiction *not* be surrendered.

Both the district court and the court of appeals determined that the state and federal actions were parallel in that they were substantial similar. Indeed, they are. In this federal action, Petitioner alleges that Respondents maliciously prosecuted him, abused process in doing so, and conspired

to commit these tortious acts. This case differs from the state court action only in that Petitioner has added allegations that Respondents' conduct purportedly violated his due process and equal protection rights under the Fourth and Fourteenth Amendments, and his First Amendment rights.[3]

Under California's focus on the "single primary rights theory" for purposes of *res judicata*, however, state law required Petitioner to plead all his theories as to why the Respondents had allegedly violated his rights under the pleaded facts in the state action. As a result, the court of appeal's decision in the state court action will bar this action. *See*, *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 784 (9th Cir. 1986) [*res judicata* bars plaintiff from litigating § 1983 claim in federal court after state court's decision on petition for writ of mandate].

Petitioner's argument that the state and federal actions are not substantially similar because the state and federal parties are not identical is disingenuous. Indeed, Petitioner has been what can only be described as arbitrary and capricious in his naming of defendants. In the related federal

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[3] Petitioner's suggestion that his conspiracy allegations in this action somehow distinguish this case from the state action (Petition, p. 10) is meritless in that civil conspiracy is not an independent cause of action, but rather is a theory of joint liability whereby all who cooperate in another's wrong may be held liable. *Hoffman v. Halden*, 268 F.2d 280, 296 (9th Cir. 1959), *overruled on other grounds, Cohen v. Norris*, 300 F.2d 24, 29-30 (9th Cir. 1962); *Thompson v. California Fair Plan Assn.*, 221 Cal.App.3d 760, 767, 270 Cal. Rptr. 590 (1990). Petitioner's conspiracy claim thus depends upon his malicious prosecution claim.

action filed on October 4, 1995 (*Hume v. Maynard, et al.*, SACV 95-849 LHM, referred to in footnote 1, *supra*), Petitioner named Respondent Maynard and deputy district attorney Ormes as defendants, for unlawful threats of arrest regarding Petitioner's continued removal of campaign signs.

Petitioner then filed his state court action on November 2, 1995, for malicious prosecution based upon his criminal prosecution for sign removal, but did not name either Maynard or Ormes as defendants. Instead, he named six other defendants: Jan and Bill Flory, Don Bankhead, William Peter Godfrey, Unocal Land and Development Company, and Dennis Chapman.

In his first amended state court complaint filed on February 6, 1996, Petitioner added an additional defendant, Professor Vincent Buck.

Finally, in this federal action, Petitioner has named as defendants the original six state court defendants, but has inexplicably dropped Professor Buck and added Detective Maynard (but not deputy district attorney Ormes) from the related federal action. He has also added the Unocal Corporation, Darryl Woods, a Unocal employee, and Detective Wallis, another Fullerton police officer who investigated Petitioner along with Maynard, but who inexplicably was not named in the related federal action.[4]

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[4] Petitioner argues, again disingenuously, that he did not name police officers Maynard or Wallis in the state case because they are immune under state law for malicious prosecution, implying that they are not immune here. Petition for Certiorari, pp. 4, 9. However, Maynard and Wallis are similarly immune from 42 U.S.C. § 1983 liability

This shifting of defendants is inexplicable in light of the fact that the underlying circumstances of all three suits initiated by Petitioner are identical. Moreover, of the ten current defendants in this action, six are the same as in the state action, and another is the same as in the related federal action. Two of the remaining three defendants (Unocal and Woods) are from the corporate parent of an original defendant (Unocal Land and Development Co.), while the last defendant (Wallis) is an employee of the City of Fullerton, the common employer at pertinent times of J. Flory, Bankhead, Godfrey, and Maynard, all of whom Petitioner is now suing in their official capacities, thus involving the common City employer.

A similar attempt to argue that state and federal cases were not substantially similar based upon non-identical defendants was rejected in *Nakash v. Marciano*:

> We should be particularly reluctant to find that actions are not parallel when the federal action is but a "spin off" of more comprehensive state litigation.

882 F.2d at 1417.

Since this action is clearly a "spin off" of the state court malicious prosecution action, Petitioner cannot defeat a *Colorado River* stay by whimsically naming defendants who are not identical to the state court defendants. This is

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for malicious prosecution under *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 42 L.Ed.2d 128, 140 (1976).

especially so when, as here, the added defendants are all substantially related either through their corporate structure or their employment, and all could have been named in the state court action.

Simply stated, the district court and the court of appeals did not abuse their discretion in finding this action substantially similar to the state court action.

IV. Petitioner Failed To Reserve His Federal Claims.

Although Petitioner lists in his Petition for Certiorari a "fourth question presented" (whether a district court may impose a stay where the plaintiff has in the state court reserved his federal claims under *England v. Louisiana State Bd. of Medical Examiners*), inexplicitly Petitioner does not address this question in the body of his Petition. Consequently, it should be deemed waived.

Even were this question considered, however, it is unavailing to Petitioner. Petitioner voluntarily filed his claims in state court on November 2, 1995. Demurrers to the complaint were sustained, the last one without leave to amend on March 29, 1996. It was not until May 28, 1996, however, that Petitioner filed his reservation of federal claims in the state action under the *England* doctrine, two months after the state court had sustained the demurrers to his complaint without leave to amend. This attempted reservation came too late. *Mission Oaks Mobile Home Park v. City of Hollister*, 788 F.Supp.1117, 1123 (N.D. Cal. 1992), *aff'd*, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110, 114 S.Ct. 1052, 127 L.Ed.2d 373 (1994). Because Petitioner failed to adequately reserve his federal

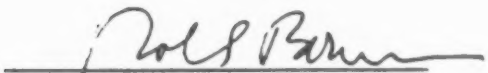
claims, the question presented by Petitioner is not an issue in this case.[5]

CONCLUSION

Supreme Court Rules, Rule 10, provides that a petition for writ of certiorari will be granted "only for compelling reasons." None have been shown here. The ruling of the district court and the unpublished opinion of the court of appeals applied the *Colorado River* factors in accordance with established law in staying this action. The petition for certiorari should be denied.

Respectfully submitted,

RUTAN & TUCKER, LLP



ROBERT S. BOWER
Attorneys for Respondent
William Peter Godfrey

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[5] Petitioner's other assertions regarding conflicts among the holdings of the Circuit Courts on the various points raised in the Petition are generally unfounded. The authorities cited by Petitioner merely reflect differences in the conclusions reached, rather than in the approaches taken or the tests applied.

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV 96 - 322-LHM (Eex) **Date** 4/17/96

Title Hume v. Bankhead, et al.

DOCKET ENTRY

PRESENT:

HON. Linda H. McLaughlin, **JUDGE**

Debra Beard	None Present
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: ORDER TO SHOW CAUSE

IN CHAMBERS:

The Court has read and considered the Complaint, which was filed on 4/3/96.

(1) **Malicious Prosecution.** "To state a claim for

malicious prosecution under section 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty." Reed v. City of Chicago, 77 F.3d 1049, 1051 (7th Cir. 1996).

Hume's complaint alleges deprivations of his First, Fourth and Fourteenth Amendment rights. See Complaint, ¶¶ 46, 51. However, the Fourteenth Amendment right to substantive due process does not support a federal claim for malicious prosecution. Singer v. Fulton County Sheriff, 63 F.3d 110, 114 (2nd Cir. 1995) Moreover, assuming without deciding that the First or the Fourth Amendments support a federal claim for malicious prosecution, plaintiff does not appear to have stated facts sufficient to support either a First Amendment or a Fourth Amendment claim.

Additionally, it appears from the face of the complaint that the many of the named defendants were not state actors.

(2) **Order to Show Cause Re: Dismissal of Malicious Prosecution Claims.** For the reasons discussed in ¶ 1 above, plaintiff is ordered to show cause in writing: (1) why his first three claims for malicious prosecution should not be dismissed for failure to state a cause of action under federal law and (2) why the claims against each named defendant should not be dismissed for failure to state facts sufficient to show that each defendant was a state actor.

APPENDIX A

(3) **Abuse of Process.** The same limits that apply to section 1983 claims based on malicious prosecution also apply to claims based on abuse of process. See Kleiss v. Short, 805 F.Supp. 726 (S.D. Iowa 1992)

Additionally, Hume's fourth claim for abuse of process appears to be based solely on California law. See Complaint, ¶67.

(4) **Order to Show Cause Re: Dismissal of Fourth Claim for Abuse of Process.** For the reasons discussed in ¶¶ 1 & 3 above, plaintiff is ordered to show cause in writing: (1) why his fourth claim for abuse of process should not be dismissed for failure to state a cause of action under federal law and (2) why the claims against each named defendant should not be dismissed for failure to state facts sufficient to show that each defendant was a state actor.

(5) **Order to Show Cause Re: Dismissal of Supplemental State Law Claims.** Plaintiff is ordered to show cause in writing why his fifth and sixth claims for abuse of process, which are supplemental state law claims, should not be dismissed pursuant to 28 U.S.C. § 1367(c).

(6) **SCHEDULE:**

4/24/96 Plaintiff's response to OSC to be filed with copy faxed to defendant

5/2/96 Defendants replies to be filed with copies faxed to plaintiff.

APPENDIX A

5/7/96 Plaintiff to file and serve Reply.

(7) The court will rule based on the papers submitted by the parties unless otherwise ordered. F.R. Civ. P. 78; Local Rule 7.11

(8) Defendants may specially appear in order to response to this OSC.

THE DATES ORDERED BY THE COURT HAVE BEEN SET ON THE COURT'S CALENDAR AND ARE FIRM DATES

COURTESY COPIES OF ALL DOCUMENTS MUST BE DELIVERED OR SENT BY FACSIMILE TO CHAMBERS OF JUDGE MCLAUGHLIN BY 12:00 NOON ON THE DATE DUE.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV 96 - 322-LHM (Eex) **Date** 5/10/96

Title Hume v. Bankhead, et al.

DOCKET ENTRY

PRESENT:

HON. Linda H. McLaughlin, **JUDGE**

Debra Beard	None Present
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: (1) OSC RE: STAY
(2) CONTINUANCE OF 4/17/96
OSC AND MOTIONS TO DISMISS

IN CHAMBERS:

(1) The Court has read and considered the parties' responses to the OSC issued on 4/17/96 and the papers

filed in connection with the defendants' motions to dismiss. The defendants' papers indicate that plaintiff filed a substantially similar action in the Orange County Superior Court against many of the defendants to this action: Hume v. Flory, Orange County Superior Court Case No. 755114. See OSC Reply of Bankhead, Maynard, Wallis, Godfrey, and Jan Flory, 4 n.1; Godfrey's OSC Reply, 4.

(2) **OSC Re: Stay.** Defendants are ordered to show cause in writing no later than **5/17/96** why the present action should not be stayed pending finality of the state court action.

Plaintiff's reply is to be filed no later than **5/24/96**.

(3) **Continuance.** The Court's 4/17/96 OSC and the motions to dismiss are continued.

(4) The Court will rule based on the papers submitted by the parties unless otherwise ordered. Fed. R.Civ. P. 78; Local Rule 7.11.

COURTESY COPIES OF ALL DOCUMENTS MUST BE DELIVERED OR SENT BY FACSIMILE TO CHAMBERS OF JUDGE MCLAUGHLIN BY 12:00 NOON ON THE DATE DUE.